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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNION CARBIDE CORPORATION,
FMC CORPORATION,
MONSANTO COMPANY,
EXXON CORPORATION,
AMERICAN MINING CONGRESS,
AMERICAN IRON & STEEL INSTITUTE,
AND AMERICAN PETROLEUM INSTITUTE,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
ENVIRONMENTAL DEFENSE FUND, INC.,
CITIZENS FOR A BETTER ENVIRONMENT,
AND BUSINESSMEN FOR THE PUBLIC INTEREST, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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February 14, 1984

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QUESTIONS PRESENTED

1. Whether, contrary to this Court's decisions in *System Federation No. 91* and *Vermont Yankee*, the consent decree entered, modified, and continued in this case contravenes constitutional separation-of-powers principles by requiring an official of the Executive Branch, the Administrator of EPA, to undertake regulatory programs and to apply regulatory criteria not mandated by the Clean Water Act.

2. Whether Congress intended that the Clean Water Act of 1977 supersede the consent decree.

3. Whether the district court has jurisdiction to preserve and enforce the consent decree if the underlying causes of action are moot.

PARTIES TO THE PROCEEDING

Petitioners (appellants in the court of appeals) are Union Carbide Corporation, FMC Corporation, Monsanto Company, Exxon Corporation, American Mining Congress, American Iron and Steel Institute, and American Petroleum Institute.* Other appellants in the court of appeals (and respondents under Rule 19.6 here) were Celanese Company, E. I. du Pont de Nemours and Company, Dow Chemical Company, Allegheny Power System, Inc. (Monongahela Power Company, Potomac Edison Company, West Penn Power Company), American Electric Power Company, Inc. (Appalachian Power Company, Columbus & Southern Ohio Electric Company, Indiana & Michigan Electric Company, Kentucky Power Company, Ohio Power Company), Baltimore Gas and Electric Company, Carolina Power & Light Company, Central and South West Services Inc., Central Hudson Gas and Electric Corporation, Central Illinois Light Company, Central Illinois Public Service Company, Cincinnati Gas & Electric Company, Cleveland Electric Illuminating Company, Commonwealth Edison Company, Consolidated Edison Company of New York, Inc., The Dayton Power & Light Company, Delmarva Power & Light Company, Detroit Edison Company, Duke Power Company, Edison Electric Institute, Florida Power & Light Company, Gulf States Utilities Company, Houston Lighting & Power Company, Illinois Power Company, Indianapolis Power & Light Company, Iowa Public Service Company, Kansas City Power & Light Company, Madison Gas and Electric Company, Middle South Services, Inc. (Arkansas-Missouri Power Company, Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service, Inc.), Minnesota Power and

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* In accordance with Rule 28.1 of the Rules of the Supreme Court, the non-wholly owned subsidiaries and affiliates of each petitioner are set forth in the separately-bound appendices to this petition, App. C at 1c.

Light Company, Montaup Electric Company, National Rural Electric Cooperative Association, New England Power Company, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Northeast Utilities Service Company (The Connecticut Light & Power Company, The Hartford Electric Light Company, Holyoke Water Power Company, Western Massachusetts Electric Company), Northern Indiana Public Service Company, Ohio Edison Company, Ohio Valley Electric Corporation, Oklahoma Gas and Electric Company, Pacific Gas and Electric Company, Pennsylvania Power & Light Company, Philadelphia Electric Company, Potomac Electric Power Company, Public Service Company of Indiana, Inc., Public Service Electric and Gas Company, Rochester Gas & Electric Corporation, San Diego Gas & Electric Company, South Carolina Electric & Gas Company, Southern California Edison Company, Southern Company Services, Inc. (Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company), Tampa Electric Company, Texas Utilities Company, Toledo Edison Company, Union Electric Company, Virginia Electric and Power Company, Wisconsin Electric Power Company, Wisconsin Power and Light Company, and Wisconsin Public Service Corporation. Each of the foregoing parties is an intervening defendant in the district court. Other intervening defendants in the district court (but not appellants in the court of appeals) are National Coal Association, American Cyanamid Company, Shell Chemical Company, Standard Oil Company (Indiana), Standard Oil Company (Ohio), Union Oil Company, Olin Corporation, The General Tire & Rubber Company, Firestone Tire & Rubber Company, Goodyear Tire & Rubber Company, B.F. Goodrich Company, American Paper Institute, and National Forest Products Association.

Respondents (appellees in the court of appeals) are Natural Resources Defense Council, Inc., Environmental Defense Fund, Inc., Citizens For A Better Environment, and Businessmen For The Public Interest, Inc. A respondent under Rule 19.6 (also an appellee in the court of appeals) is William D. Ruckelshaus, Administrator, Environmental Protection Agency. Party plaintiffs in the district court also include National Audubon Society, Inc. and Dennis L. Adamczyk.

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CITIZENS FOR A BETTER ENVIRONMENT,
AND BUSINESSMEN FOR THE PUBLIC INTEREST, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Union Carbide Corporation, et al., respectfully petition for a writ of certiorari to review the decisions of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals dated October 4, 1983 is reported at 718 F.2d 1117 and is reprinted in the separately-bound appendices to this petition, App. A at 1a. The corresponding opinions of the district court were

dated February 5, 1982 and May 7, 1982. They were unofficially reported at 16 Env't Rep. Cas. (BNA) 2084 and 17 Env't Rep. Cas. (BNA) 2013, respectively, and are reprinted in the separately-bound appendices, App. A at 103a, 117a. The opinion of the court of appeals dated September 16, 1980 is reported at 636 F.2d 1229, and is reprinted in the appendices, App. A at 45a. The corresponding opinion of the district court was dated March 9, 1979, and was unofficially reported at 12 Env't Rep. Cas. (BNA) 1833. It is reprinted in the appendices, App. A at 121a.

JURISDICTION

In its opinion dated September 16, 1980, the court of appeals dealt with several legal issues presented to it but remanded the case to the district court to consider another issue. (App. A at 100a.) Accordingly, at that point review by this Court on a petition for writ of certiorari was not appropriate. *See Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967).

The further opinion and judgment of the court of appeals was entered on October 4, 1983. (App. A at 1a (opinion) and 195a (judgment).) A timely petition for rehearing and a suggestion for rehearing *en banc* were denied by orders of the court entered on November 18, 1983. (App. A at 203a, 205a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 1, article II, §§ 1 (first sentence) and 3, and article III, §§ 1 and 2 (first clause) of the Constitution, along with Sections 301(b), 302, 303, 306 and 307 of the Clean Water Act, 33 U.S.C. §§ 1311(b), 1312, 1313, 1316 and 1317, are reprinted in the separately-bound appendices to this petition, App. B at 1b.

STATEMENT

This case concerns a consent decree which requires the Administrator of the Environmental Protection Agency ("EPA") to undertake regulatory programs and to apply regulatory criteria not mandated by statute. The court of appeals in two opinions, one in 1980 and the other in 1983, considered the question whether the consent decree impermissibly constrains the discretion Congress granted to the Administrator in the Clean Water Act. In its 1983 decision, a divided panel of the court of appeals finally concluded that the constraints on the Administrator's discretion imposed by the decree were not impermissible. Rehearing *en banc* was denied by a divided five-to-three vote (three judges not participating).

The extended consideration accorded the constrained-discretion issue in the court of appeals reflects that court's discomfiture with and uncertainty over application of this Court's decisions recognizing limitations on judicial power derived from constitutional separation-of-powers principles. The ultimate decision of the closely divided court of appeals fails to apply those principles properly. Specifically, the 1983 decision conflicts with the premises of this Court's decisions in *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961), and *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

A. Statutory Framework

Under the Clean Water Act ("the Act"), EPA is directed to issue four basic types of effluent regulations. While the complaints in this litigation specifically concerned two of these types of regulations, both of which arise under Section 307 of the Act, 33 U.S.C. § 1317, the consent decree resulting from them relates to all four types of regulations, and specifies additional non-statutory programs as well.

The four different types of effluent regulations may be characterized as follows: Section 301(b) of the Act, 33 U.S.C. § 1311(b), calls on EPA to establish technology-based effluent limitations regulations for the various major segments of American industry. *See E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) (*"du Pont"*). Section 306 of the Act, 33 U.S.C. § 1316, provides that EPA is to issue national standards of performance for new sources in these major categories of industry. *See du Pont, supra*, 430 U.S. at 137. Under Section 307(a), 33 U.S.C. § 1317(a), EPA is to issue national effluent standards for toxic pollutants.[1] Finally, Sections 307(b) and (c), 33 U.S.C. § 1317(b) and (c), authorize EPA to issue pretreatment standards for existing and new sources of discharges, respectively, into publicly owned treatment works.

B. The Complaints

Four separate complaints are involved in this litigation. The first suit was brought in 1973 by the Natural Resources Defense Council, Inc. and several other groups ("NRDC") against EPA. NRDC alleged that the Agency had violated Section 307(a) of the Act by developing a list of toxic pollutants using selection criteria that were not specified in the then-extant provisions of Section 307(a) and which improperly limited the list.[2] NRDC also alleged that EPA had unlawfully failed to list 25 substances. After EPA had filed the "administrative record" regarding its actions, the district court granted EPA's motion to dismiss the complaint. The court held that the Administrator had not abused his discretion when he established the list and that the Administrator's consideration of other substances for inclusion on the

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[1] In doing so, EPA may designate the categories of sources to which each such effluent standard applies. *See* Section 307(a)(5), 33 U.S.C. § 1317(a)(5).

[2] *NRDC* v. *Train*, No. 2153-73 (D.D.C., filed Dec. 7, 1973).

list satisfied the statutory command that the list be revised from time to time. On appeal the court of appeals reversed, holding that plaintiffs' counsel had made a substantial showing that the Administrator had not produced the entire administrative record of his decision. *NRDC* v. *Train*, 519 F.2d 287, 291 (D.C. Cir. 1975).

The second and third complaints concerned a different aspect of Section 307(a). NRDC and others alleged that EPA had violated then-existing Section 307(a) of the Act by failing to promulgate final toxic pollutant effluent standards for the nine listed substances within six months of proposal of such standards.[3] The complaints requested the court to order EPA to establish final standards for the nine substances.

The fourth case addressed pretreatment standards under Section 307(b) of the Act. NRDC claimed that EPA violated Section 307(b)(1) by failing to establish final pretreatment regulations within 90 days of the date EPA published proposed regulations.[4]

C. The Consent Decree

After the three 1975 complaints had been brought, and the dismissal of the 1973 complaint had been reversed by the court of appeals on a procedural ground, NRDC and EPA began settlement negotiations. These discussions coincided with a policy decision within the Agency to abandon any major effort to set toxic pollutant effluent standards based upon Section 307(a) and instead to rely more heavily on technology-based effluent limitations and standards based upon Sections 301(b) and 306 of the Act. NRDC and EPA embodied these policy choices in a joint settlement agreement intended as a resolution of the

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[3] *Environmental Defense Fund* v. *Train*, No. 75-0172 (D.D.C., filed Feb. 6, 1975); *Citizens For A Better Environment* v. *Train*, No. 75-1698 (D.D.C., filed Oct. 15, 1975).

[4] *NRDC* v. *Train*, No. 75-1267 (D.D.C., filed Aug. 4, 1975).

four pending lawsuits.[5] As NRDC has observed, "[t]he Agreement sets out the precise nature, scope, and timing of every aspect of EPA's program." Brief for Appellees NRDC, et al., at 4, in *Environmental Defense Fund, Inc.* v. *Costle*, 636 F.2d 1229 (D.C. Cir. 1980). Portions of the agreement do relate to, and require that EPA carry out, statutory mandates.[6] Other portions, however, have no direct statutory basis, *i.e.*, they compel EPA to employ criteria and standards not found in the Act and to implement whole regulatory programs not present in the Act.[7]

NRDC and EPA jointly proffered the settlement agreement to the district court on March 31, 1976. The district court allowed interested persons to file comments regarding it, whether the persons were parties or not, and a number of industry groups vigorously opposed both the settlement and entry of the settlement as a decree of the court. After requiring several modifications to the agreement,[8] on June 9, 1976 the court ap-

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[5] Several industrial groups including the American Iron and Steel Institute and American Petroleum Institute had intervened in one of the cases, No. 75-0172, shortly after suit was brought. These intervenors were given notice of the settlement agreement after it had been negotiated but before it was presented to the district court.

[6] These portions of the agreement largely concern deadlines for issuing effluent limitation regulations. See ¶ 7 of the agreement, App. A at 164a-166a (initial agreement), 142a-143a (March 1979 order), 118a-120a (May 1982 order). *See also infra*, at 13 n.11 (discussing August 1983 and January 1984 modifications to the schedule).

[7] Examples of these provisions are ¶¶ 4(c), 8 and 12 of the agreement as modified. App. A at 141a-146a. *See infra*, at 19 n.13.

[8] Among other things, the district court advised that it would "not review substantive judgments made by the Administrator of EPA as the original agreement seemed to require, but will merely ensure good faith compliance with the terms of the agreement." *NRDC* v. *Train*, 8 Env't Rep. Cas. (BNA) 2120, 2121 (D.D.C. 1976), App. A 151a (footnote omitted).

The district court acknowledged the possibility "that even this limited role will require a substantial investment of judicial resources." *Id.* at 2121, App. A 152a.

proved it as a "just, fair, and equitable resolution of the issues raised." *NRDC* v. *Train*, 8 Env't Rep. Cas. (BNA) 2120, 2122 (D.D.C. 1976), App. A 156a. The agreement was entered as a decree of the court. No appeal was taken from the order adopting the agreement.[9]

D. The Clean Water Act of 1977

In 1976 and 1977, Congress considered amendments to the Federal Water Pollution Control Act ("FWPCA"). During Congress' deliberations both EPA and NRDC put forward the policy positions that had been embodied in their settlement agreement (and thus in the district court's decree). In December 1977, Congress passed extensive amendments to the Federal Water Pollution Control Act (the "1977 Amendments")[10] which in effect adopted several key aspects of the decree:

> The highlight of this bill—the most important and far-reaching amendments are contained in a package of provisions responding to the most critical deficiencies in . . . [the 1972 FWPCA] dealing with toxic pollutants and the 1983 requirements in the act for industrial discharges.

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[9] An appeal was taken from an order of the district court denying the applications of several groups of manufacturers to intervene in the litigation. The court of appeals reversed the district court's denial of intervention, holding that the groups were entitled to intervene as of right under Fed. R. Civ. P. 24(a)(2). *NRDC* v. *Costle*, 561 F.2d 904 (D.C. Cir. 1977).

In opposing intervention, EPA among other things had argued that "intervention has . . . been denied . . . when private parties have sought to interfere with a consent decree worked out by a federal agency." Federal Defendants' Opposition to Motion for Leave to Intervene, served April 5, 1976, at 19. EPA also claimed that it shared the asserted interests in the regulatory process of the industry applicants for intervention. *Id.* at 15. In ordering that intervention be granted, the court of appeals rejected EPA's claims. *NRDC* v. *Costle*, *supra*, 561 F.2d at 908-912.

[10] The Act was also redesignated as the "Clean Water Act." Section 518 of the Act, 33 U.S.C. § 1251 note.

> 123 Cong. Rec. 38,959 (1977) (Statement of Congressman Roberts, manager on the part of the House of the Committee on Conference).

The toxic pollutant provisions of the 1977 Amendments repealed then-existing requirements of Section 307 of the Act that required EPA to proceed under a strict time schedule to establish health-based effluent standards on a pollutant-by-pollutant basis. Instead, the new Section 307, when taken with new Section 301(b), requires that EPA issue technology-based effluent limitation regulations for sixty-five specified pollutants on an industry-by-industry basis.

Immediately prior to House adoption of the Conference Report, the floor manager, Congressman Roberts, explained that the amendments gave EPA both the authority and the discretion necessary for an effective regulatory program and that the consent decree accordingly should be vacated:

> In summary, the revisions to the toxics regulatory program contained in the conference report on H.R. 3199 simplify the procedures for identifying toxic pollutants and promulgating regulations according to their characteristics. The discretion exercised by the Administrator is broadened, the procedures less formally structured, and burdens of proof modified to the point where the program may proceed in a more rapid and orderly fashion without further recourse to the courts.
>
> Crisis-by-crisis reaction to the problem of toxics must no longer be the norm, but [be] replaced by an orderly program for adding compounds to the list, with the Administrator fully in charge. *It, therefore, would be entirely appropriate for the United States to petition the courts to relinquish jurisdiction over toxic pollutant control under Public Law 92-500* [the 1972 FWPCA], *now that the statutory basis has been laid for a workable regulatory pro-*

> *gram the lack whereof led to the litigation resulting in the consent decree. This is particularly appropriate in view of* the large number of potentially toxic chemicals to be addressed by the program and *the need for administrative discretion within the revised regulatory framework to carry out the provisions of law enacted herein.*
>
> This is the intent of this legislation, an outgrowth of House initiatives by the House conferees.
>
> 123 Cong. Rec. 38,960-61 (1977) (emphasis added).

Congressman Roberts was a member of the committee that drafted the 1972 FWPCA, the Chairman of the subcommittee of the House Committee on Public Works and Transportation that drafted the 1977 Amendments, the Chairman of the House conferees, the Vice Chairman of the House-Senate Conference Committee, and the House floor manager of the Conference Report. The statement in question was made by him—prior to the House vote on the 1977 Amendments—in his capacity as the floor manager of the Conference Report on the 1977 Amendments, in order to apprise his colleagues as to the intent of the conferees.

His statement takes on added significance in light of the fact that the toxic pollutant provisions of the 1977 Amendments were drafted in the Conference Committee. *See* 123 Cong. Rec. at 38,949 *et seq.*, providing a comparison of the House Bill and the Senate Bill with the resulting 1977 Amendments. Thus, the Committee Reports which accompanied the original bills are of no value in interpreting the toxic pollutant provisions of the 1977 Amendments. The only relevant legislative history with respect to these provisions is the Conference Report (H.R. Rep. No. 830, 95th Cong., 1st Sess. 82-85 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News at 4457-60) and the statements of the members who managed the Conference Report on the floor of the House and Senate.

E. Subsequent Proceedings In District Court Regarding The Decree

After enactment of the 1977 Amendments, EPA did not move to have the decree vacated. Rather the Agency proceeded with its efforts to carry out the new statutory requirements. However, on September 26, 1978, NRDC moved for an order to show cause why EPA should not be held in contempt of court for failing to meet various deadlines set by the consent decree. EPA responded with a motion to amend the decree by (1) extending the deadlines for establishing regulations, (2) modifying the Agency's authority to exclude certain pollutants and industry categories from regulation, and (3) extending the deadline for compliance with the regulations to June 30, 1984. *See Environmental Defense Fund, Inc.* v. *Costle*, 636 F.2d 1229, 1237 (D.C. Cir. 1980), App. A 54a.

Contemporaneously, the industry parties who by then had been granted intervention ("the Companies") filed a motion to vacate the decree. They advanced three independent grounds for relief: (1) Congress intended that the toxic pollutant provisions of the 1977 Amendments supersede the provisions of the decree, (2) the decree should be vacated because the four cases that underlay it were moot, and (3) modification of the decree would abridge applicable public notice-and-comment requirements. (*See id.* at 1237, App. A 54a-55a.)

NRDC then filed discovery requests concerning virtually every phase of EPA's program to implement the Act, including the basis for levels of funding and staffing at the Agency. After the parties agreed to a schedule for discovery, briefing, and a hearing, NRDC and EPA began negotiating a settlement of the further controversy. The Companies were excluded from these discussions. On November 28, 1978, EPA held a meeting with the Companies and announced that it had reached a tentative agreement with NRDC. The Companies were given ten days to submit written comments regarding

the tentative agreement. The comments submitted did not result in any substantive revision of the tentative agreement although certain technical changes based on these comments were incorporated. *NRDC* v. *Costle*, 12 Env't Rep. Cas. (BNA) 1833, 1834, App. A 123a.

To carry out their new settlement, EPA and NRDC filed a joint motion to modify the decree and withdrew their earlier motions. NRDC also withdrew the interrogatories it had served on EPA. The Companies declined to withdraw their motion to vacate. The district court on March 9, 1979 denied the Companies' motion to vacate and granted the joint EPA-NRDC motion to modify the decree. (*Id.* at 1840, App. A 139a.) In denying the Companies' motion, the court held that (1) Congress did not intend the 1977 Amendments to supersede the consent decree, (2) even assuming that some of the four cases underlying the decree were moot, the mootness challenge must fail because the original causes of action have become inseparable and the decree representing the four cases must be taken as a whole, and (3) the modification would not violate notice-and-comment requirements. (*Id.* at 1836, 1838, App. A 128a, 132a-136a.)

F. The Decisions Of The Court Of Appeals

1. The court of appeals' "affirmed and remanded" decision of September 1980.

On the Companies' appeal, the court of appeals affirmed the district court's order refusing to vacate the decree, but it remanded to the district court for consideration of the question whether the consent decree impermissibly infringes on the discretion Congress committed to EPA to implement the Clean Water Act. *Environmental Defense Fund, Inc.* v. *Costle*, 636 F.2d 1229, 1259 (D.C. Cir. 1980), App. A 100a. The court of appeals noted that "[t]he Companies' brief adverted to this issue in connection with their argument that the modifications constituted rulemaking, but did not pre-

sent it as an independent objection to the modified settlement agreement." (*Id.* at 1258 n.99, App. A 98a n.99.) In remanding, the court commented that "EPA, for example, seems to attach no particular significance to the fact that the Agreement is embodied in a court order", and also that "[i]t is not clear whether EPA . . . considers itself bound to follow the procedures and decisionmaking criteria set out in the Agreement only for as long as the Administrator deems them appropriate." (*Id.* at 1258, App. A 99a.)

2. The district court's proceedings on remand.

On remand, the Companies filed with the district court a Motion to Vacate the Consent Decree Or, Alternatively, to Revise the Decree. EPA filed a cross-motion requesting that the district court modify the decree in light of enumerated "changed circumstances." EPA's requested modifications were comparable to the revisions sought alternatively by the Companies. NRDC opposed both motions.

By orders dated February 5, 1982 and May 7, 1982, the district court denied both the Companies' and EPA's motions to modify the decree. *NRDC* v. *Gorsuch*, 16 Env't Rep. Cas. (BNA) 2084 (D.D.C. 1982), App. A 103a, and 17 Env't Rep. Cas. (BNA) 2013 (D.D.C. 1982), App. A 117a. In denying the Companies' motion, the district court said it had "no doubt that the instant settlement agreement infringes to some degree on the EPA Administrator's discretion." (16 Env't Rep. Cas. (BNA) at 2087, App. A 107a.) Nevertheless, it did "not believe that this infringement is impermissible." *Id.*

The district court claimed "particularly broad" equitable powers to "utilize flexible and novel approaches to implement congressional intent," especially "where the public interest is involved," and described the entry and continuation of the decree as an exercise of those equitable powers. (*Id.* at 2087-88, App. A 108a-109a.) The

district court pointed out that a remedial order must be based upon the "presence of unlawful or impermissible agency action." (*Id.* at 2088, App. A 109a.) However, the court made no attempt to find a *nexus* between any unlawful agency action and the provisions of the decree. The court did not analyze the provisions of the decree in light of the Administrator's statutory obligations and possible failure to perform those obligations. Instead, the court broadly asserted that "the agency has failed to implement a congressionally sanctioned process aimed at protecting the public from toxic pollutants" and that "the aggregate record of the EPA with regard to the regulation of these toxic pollutants can be considered equivalent to administrative action unlawfully withheld." (*Id.* at 2088, App. A 109a.)

Regarding EPA's motion, the district court said it was denying any relief because "at the present time the defendants have presented insufficient justification for revising the consent decree" (17 Env't Rep. Cas. (BNA) 2015, App. A 117a), and that "at this point in time the EPA must be pushed to work harder." *Id.*[11]

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[11] The court also directed EPA to complete within one year its regulatory actions to establish technology-based regulations for various industries. *See* 17 Env't Rep. Cas. (BNA) 2015-16, App. A 119a-120a. Subsequently, on October 26, 1982, the court granted a different motion by EPA to modify the decree, aimed only at revising the schedule for establishing effluent regulations for certain industries. Thereafter, on August 2, 1983 and January 6, 1984, the court granted further motions by EPA to modify the schedule in the decree for establishing regulations for specific industries.

NRDC's requests for awards of attorneys' fees have also been disputed in the litigation. On August 16, 1978, the district court awarded NRDC attorneys' fees and costs of litigation totalling $100,976.14, covering the period of September 1973 through November 1977. During this period, NRDC initiated the lawsuits and negotiated the original settlement with EPA. The award of attorneys' fees and costs was against the government, which took no appeal.

On May 17, 1982, NRDC moved the court for an order awarding further costs of litigation, including attorneys' fees, covering the

3. *The court of appeals' decision of October 1983.*

On appeal from the district court's orders on remand refusing both the Companies' and EPA's motions to vacate or modify the decree, the court of appeals by divided vote affirmed. *Citizens For A Better Environment* v. *Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983), App. A 1a. In an opinion by Senior District Judge Bonsal, sitting by designation, joined by Judge Wald, the court held that the decree did not impermissibly infringe upon the Administrator's congressionally-conferred discretion. (718 F.2d 1120, App. A 8a.) The majority acknowledged, as all parties had, that the decree constrains the discretion of EPA's Administrator by requiring him to apply criteria and standards not found in the Act and to undertake programs not required by the Act. (718 F.2d 1124, App. A 17a.) The majority concluded that these constraints were permissible, stressing that the decree provided a means of implementing the Act "that is acceptable to both sides [sic] in this dispute" and emphasizing that the decree was "consistent with the purpose of the [Act]." (718 F.2d 1126, App. A 22a.) The ma-

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period of May 1978 onwards. This time, NRDC sought an award against both EPA and the Companies. It did not, however, then specify the amount requested. Eleven months later, on April 20, 1983, NRDC filed a detailed memorandum in support of this motion requesting attorneys' fees in the amount of $196,799.93. This request was based upon an extraordinarily enhanced award of 210 percent of the "lodestar" value for the time its attorneys spent regarding implementation of the decree (717.79 hours), and an enhanced award of 115 percent of the lodestar rate for 188.45 hours spent in preparing the attorneys' fees motion itself. NRDC has subsequently requested an additional award of $15,525.50 for preparation of a reply to the oppositions of EPA and the Companies. The district court has not yet ruled on NRDC's motion.

NRDC's motion for further attorneys' fees specifically excluded any request for an award of attorneys' fees concerning the judicial proceedings related to the constrained-discretion issue. NRDC implied that its work regarding that issue would be covered by a subsequent request.

jority considered that the Companies had advocated "an overly literal reading of *System Federation No. 91* v. *Wright*, [364 U.S. 642 (1961)]." (718 F.2d 1125, App. A 19a.) In the majority's view, this Court's reference in that case to statutory authority for a consent decree could be construed instead to relate merely to consideration of general statutory purposes:

> The statement [in *System Federation No. 91*] that a district court's 'authority to adopt a consent decree comes only from the statute which the decree is intended to enforce,' . . . means only that the focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interests of each party to the settlement.
>
> (*Id.*)

The majority correlatively distinguished this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), on the ground that the decree in the instant case was initially entered *"with EPA's consent"* (emphasis by the court). In doing so, the majority adopted a general "public interest" test for entry of consent decrees:

> It may well be, as the Companies argue, that *"a court has a duty to determine that any consent judgment rendered is within the bounds of its judicial power*, notwithstanding the parties' consent." Br. for Appellants at 40. Nevertheless, as the discussion in Part II above [regarding *System Federation No. 91*] indicates, *a court fulfills its responsibility in this respect simply by determining that the settlement is consistent with the statute the consent judgment is to enforce and fairly and reasonably resolves the controversy in a manner consistent with the public interest.*
>
> (718 F.2d 1128, App. A 24a-25a (emphasis added).)

Judge Wilkey in dissent disagreed with the fundamental premises of the majority's decision. He began his analysis with the undisputed fact that "the decree does restrict the discretion of the Administrator of the EPA." (718 F.2d 1131, App. A 33a.) In his view the constraints were "not *de minimis*"; indeed, "[t]hey impose[d] duties on the Administrator that differ in kind as well as in scope from those duties imposed by the Act." (718 F.2d 1131-32, App. A 33a.) They were neither mandated by the Act nor necessary to ensure that EPA performs its duties under the statute. *Id.*[12]

Judge Wilkey looked to the constitutional limits on the power of an article III court, and concluded from this Court's decisions construing those limits that a federal court may not issue any order or decree commanding an Executive Branch official to exercise his or her regulatory discretion in a particular way. (718 F.2d 1131, App 32a.) He considered that the consent decree constituted judicial action "without any statutory or constitutional mandate." (718 F.2d 1135, App. A 40a.) In his view, permitting a federal court's equity power to extend so far "would abolish the principle of separation of powers" (*id.*), and would weaken democratic control over action by administrative agencies. (718 F.2d 1136, App. A 42a-43a.)

Judge Wilkey distinguished the very broad equity powers assumed by federal courts in apportionment cases and in instances of violation of the equal protection and due process clauses of the Constitution on the ground that those cases involved the supremacy clause and this

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[12] Judge Wilkey also addressed the majority's emphasis that the decree was initially entered with the consent of an Administrator. In his view, "[f]or reasons that ultimately have to do with preserving the democratic nature of our Republic, American courts have never allowed an agency chief to bind his successor in the exercise of his discretion." (718 F.2d 1134, App. A 38a-39a.)

case concerned intra-federal separation-of-powers limitations:

> Courts have used their equitable powers to assume administrative and legislative roles, supervising in a highly active and intrusive manner prisons, school systems, mental hospitals and electoral apportionment.
>
> In those cases, however, the court invariably acts against state governments or individual citizens. Those decisions in which the court seizes the broadest powers are also those in which it declares that the doctrine of separation of powers does not apply "vertically" when courts act under the Supremacy Clause. In the case at issue, the court acts against a coordinate and co-equal branch of government. The court cannot take refuge in the Supremacy Clause. The court must face head-on the separation of powers issue.
>
> (718 F.2d 1134-35, App. A 39a-40a (footnotes omitted).)

4. ***Denial of rehearing*** **en banc.**

A timely petition for rehearing and a suggestion for rehearing *en banc* were denied by orders of the court of appeals entered November 18, 1983. (App. A 203a, 205a.) Chief Judge Robinson and Judges Wald, Mikva, Edwards, and Ginsburg voted to deny rehearing *en banc*. Judges Wilkey, Scalia, and Starr noted that they "would [have] grant[ed] rehearing *en banc* for the reasons set forth in Judge Wilkey's dissenting opinion" (App. A 206a), and Judges Wright, Tamm, and Bork did not participate.

REASONS FOR GRANTING THE WRIT

The first issue presented in this petition is one of considerable importance. The question whether a regulatory officer's statutorily-conferred discretion can be diminished by constraints in a consent decree has significant

implications for the continued working relationships of the Executive, Legislative, and Judicial Branches of the Federal government. Resolution of the issue turns on the proper limits of the power of the federal courts under article III of the Constitution. As Judge Wilkey observed, a "government by consent decree" has fundamental, negative effects upon the processes and institutions of representative democracy: it enhances the powers of special interest groups and diminishes the responsiveness of Federal agencies to the views of other citizens, Congress, and even the Executive. In its decisions in *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961), and *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), this Court drew upon the limitations of article III of the Constitution and the coordinate role of the judiciary in a democracy to evaluate the validity of judicial actions that abridged statutory commands and executive authority. The decision by the majority of the court of appeals in this case conflicts with principles recognized and applied in those decisions.

I. CONTRARY TO THIS COURT'S DECISIONS IN *SYSTEM FEDERATION NO. 91* AND *VERMONT YANKEE*, THE DECREE APPROVED BY THE COURT OF APPEALS CONTRAVENES CONSTITUTIONAL SEPARATION-OF-POWERS PRINCIPLES BY CONSTRAINING THE STATUTORILY-CONFERRED DISCRETION OF AN OFFICIAL OF THE EXECUTIVE BRANCH

A. The Decree Exceeds The Judicial Power Conferred On A Federal Court By Article III Of The Constitution

Everyone involved with this litigation has acknowledged that substantial portions of the consent decree constrain the statutorily-conferred regulatory discretion of an Administrator of EPA either by requiring the Agency to apply criteria and standards not found in the Clean Water Act or by mandating the Agency to under-

take programs not required by the statute.[13] These provisions of the decree spring solely from the settlement "contract" and have no basis in any duty imposed upon EPA by the Act.[14]

The entry, subsequent modification, and continuation of the consent decree in this case were judicial acts. *Pope* v. *United States*, 323 U.S. 1, 12 (1944); *United States* v. *Swift & Co.*, 286 U.S. 106, 115 (1932).[15] A federal court's power to take such action is thus circumscribed by the limits of the judicial power conferred by article III of the Constitution. *System Federation No. 91* v. *Wright*, 364 U.S. 642, 652-53 (1961).

Article III provides that the federal judicial power shall only extend to "cases and controversies."[16] This "case and controversy" limitation precludes a court from embodying in a judicial decree a settlement agreement that goes beyond the actual legal dispute between the parties. *See Pope* v. *United States*, 323 U.S. 1, 11-12 (1944).

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[13] The majority opinion in the court of appeals and Judge Wilkey's dissent both explore in some detail the extra-statutory criteria, standards, and programs required by ¶¶ 4(c), 8, and 12 of the decree. (718 F.2d 1122-24 (majority), 1132-33 (dissent), App. A 13a-17a, 33a-35a.) In a nutshell, ¶¶ 4(c) and 8 of the decree obligate the Administrator to apply criteria and standards not found in the Act in making regulatory decisions. Paragraphs 4(c) and 12 of the decree require the Administrator to undertake regulatory programs that are not required by the Act.

[14] As Judge Wilkey noted, the duties imposed on the Administrator by these provisions of the decree differ in kind as well as in scope from the duties imposed by the Act. (718 F.2d 1131-32, App. A 33a.)

[15] *E.g.*, consent decrees generally are treated as final judgments on the merits and accorded res judicata effect. *United States* v. *Southern Ute Indians*, 402 U.S. 159 (1971); *United States* v. *International Building Co.*, 345 U.S. 502 (1953).

[16] *See, e.g., Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803); *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6 (1951).

In addition, a court's power to adopt a consent decree derives from, and is limited by, the terms of the statute that the decree seeks to enforce. *System Federation No. 91, supra*, 364 U.S. at 652-53. The court may not enlarge upon the statute's substantive requirements. *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227-28 (1980). Nor may it prescribe extra-statutory rules of procedure to an administrative agency. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 541-49. Indeed, when a court enforces a consent decree it enforces the underlying statute, not a promise between the parties. *System Federation No. 91 supra*, 364 U.S. at 653.[17]

The decision by the majority in the court of appeals cannot be reconciled with these fundamental limitations on the scope of federal judicial power under article III.[18]

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[17] The majority in the court of appeals had no basis for abjuring any reference to statutory provisions as an "overly literal reading of *System Federation No. 91* v. *Wright*," and instead relying generally on "the purposes which the statute is intended to serve." (718 F.2d 1125, App. A 19a.)

[18] The decision by the court of appeals in this case also conflicts with decisions by other courts of appeals applying these limitations on judicial power. For example, in *Washington* v. *Penwell*, 700 F.2d 570 (9th Cir. 1983), a district court on motion had vacated those portions of a consent decree that required state funding of a legal services program for prisoners. In affirming, the court of appeals opined—

> The district court could not have entered an involuntary decree requiring state officials to do more than the minimum needed to conform with federal law. "[A]n equitable decree should not go further than necessary to eliminate the particular constitutional violation which prompted judicial intervention in the first instance." Similarly, the district court's authority to adopt a consent decree comes only from the law the decree is intended to enforce.
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> . . . .

[Continued]

1. ***The decree contravenes constitutional separation-of-powers principles.***

Because this case involves coordinate branches of the Federal government, the question concerning article III powers turns on separation-of-powers principles rather than on the Supremacy Clause. *See* 718 F.2d 1134-35, App. A 39a-40a (Wilkey, J., dissenting).[19]

From the earliest days of the American Republic, federal courts have acknowledged that they could not dictate how an officer of the Executive Branch would exercise his or her discretion. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion"). This limit on judicial power is based upon a recognition of the separation of powers of co-equal branches of government. *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428 (1923). It has been applied by this Court in many dif-

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[18] [Continued]

The funding provision, purporting to bind the state, is without authority and in excess of what was required to alleviate violations of federal law.

Id. at 574-75 (citations omitted).

Moreover, the source of the limitation on judicial power in *Washington* v. *Penwell*, *supra*, was the supremacy clause, not separation-of-powers principles. This Court has accorded *less* scope to limitations based on the supremacy clause than to those based on separation-of-powers principles. *See* 718 F.2d 1134-35, App. A 39a-40a (Wilkey, J., dissenting). *See* also *infra*, n.19 and accompanying text.

[19] Accordingly, the principal question posed by this petition is similar to, but not the same as, that presented in *Maryland* v. *United States*, 51 U.S.L.W. 3632 (U.S. Feb. 28, 1983) (Rehnquist, J., joined by Burger, C. J., and White, J., dissenting from summary affirmance). For the same reason, it is distinguishable from the question of judicial power typically posed by reapportionment cases and instances of violation of the equal protection and due process clauses of the Constitution. *See supra*, at 16-17. *See generally* Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 Stan. L. Rev. 661 (1978).

ferent contexts. *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227-28 (1980); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*; *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-34 (1976); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

The court of appeals' decisions upholding the decree in this case cannot be reconciled with the principles that underlie these decisions. The majority in the court of appeals misapprehended these principles when it focused its evaluation. It asserted approvingly that the consent decree does not compel a particular course of action because it does not dictate the Agency's "final decision on the merits" and does not "prescribe the content of the regulations" that EPA is to issue. (718 F.2d 1128-29, App. A 26a.) However, the decree does "dictate[] to the agency the methods, procedures, and time dimension of the needed inquiry,"[20] without any statutory authority for doing so. Consequently, contrary to the conclusion of the majority of the court of appeals, the decree "propel[s] the court into the domain which Congress has set aside exclusively for the administrative agency." *SEC* v. *Chenery Corp.*, *supra*, 332 U.S. at 196.

2. By initially consenting to the decree, EPA could not waive a constitutionally-based limitation on federal judicial power.

The majority in the court of appeals erred in its assessment that the limitations on judicial power explicated in *Vermont Yankee* and prior decisions of this Court were not applicable because EPA had initially consented to entry of the decree. (718 F.2d 1128, App.

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[20] *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 545, quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

A 25a-26a.) By initially consenting to the decree, EPA could not waive or elide a constitutionally-based limitation on federal judicial power. *See Insurance Corp. of Ireland* v. *Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982); *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951); *Cutler* v. *Rae*, 48 U.S. (7 How.) 729, 731 (1849).[21]

This case does not concern the government's ability to settle litigation generally; nor does it raise any broadly inclusive issue respecting whether settlement agreements should be entered as judicial decrees. A court can enter as a decree and enforce any settlement agreement the terms of which it could have included in a direct judicial order at the end of the litigation given the statutory violations alleged. It cannot issue a decree which incorporates settlement terms that overreach the provisions of the governing statute.[22]

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[21] In *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 237-38 n.10 (1975), this Court commented that "consent decrees . . . have attributes both of contracts and of judicial decrees," and that "consent decrees are treated as contracts for some purposes but not for others." The "contractual" aspects of the decree in this case, however, could not properly have included waiver of a constitutionally-based limitation on judicial power.

[22] After trial of the merits, the district court neither would nor could have entered a decree of the type it embraced as a result of the settlement.

The settlement embodied in the decree in this case differs strikingly from the typical settlement reached by EPA or any other federal regulatory agency. Such settlements, whether of enforcement or of rulemaking actions, traditionally have not bound the agency to divest itself of discretion beyond the specific matters in dispute. Even then, the agency always is careful to retain its statutory powers. One commentator described the typical settlement in litigation over rulemaking as follows:

> It is a relatively common occurrence . . . for parties that have challenged a regulation to negotiate an acceptable agreement. In return for withdrawing the petition challenging the rule, the agency frequently agrees to publish a change in the regulation

In addition, the court of appeals chose to ignore the fundamental distinction between an agency taking an action because it has determined in the exercise of its administrative discretion that it should do so and an agency being ordered by a court to take that same action. In the former case, the agency is always free to change its mind. *See Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 216-17 (1930). But where, as here, a court incorporates in a judicial decree provisions of a settlement agreement that are not required by statute, the present Administrator, and future Administrators, cannot further exercise their discretion by deciding subsequently to change their course of action. But for the order of the district court, EPA now would have courses of action open to it other than those mandated by the decree.[23]

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as a proposed rule. Because the main parties in interest negotiated the change, few comments are received, and the agency then modifies the rules in accordance with the negotiated agreement. Of course, if an agency receives comments necessitating a change from the negotiated agreement, it must change the rule accordingly.

Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L. J. 1, 37-38 (1982) (footnotes omitted).

Typically, the private and governmental parties to such a settlement agree that if the Agency's final action does not square with the agreed regulatory proposal, then the settlement itself is not effective. The parties return to their original positions as adversaries, and can continue to litigate the dispute.

[23] EPA's unsuccessful motion in 1981 to win release from the extra-statutory requirements of the decree was made on the grounds that:

Extra obligations not required by statute necessarily infringe on EPA's ability to allocate its limited resources in the way it finds best.

. . . .

It is also important for EPA to have the flexibility to reevaluate past administrative actions which are not required by statute but may require substantial resources to implement.

[Continued]

Moreover, as Judge Wilkey pointed out in dissent, the relinquishment by one Administrator of his or her discretion cannot legally bind his or her successors. (718 F.2d 1134, App. A 38a-39a.)[24]

B. The Question Of Judicial Power Erroneously Decided By The Court Of Appeals Has An Important Bearing On The Continued Interaction Of The Executive, Legislative, and Judicial Branches

If the majority in the court of appeals is correct in its conclusion that consent decrees of the type entered in this case are within a federal district court's article III power, then an agency administrator could enter into such a decree with a private litigant and thereby preclude successive agency officers from exercising their congressionally bestowed discretion by implementing different policies.[25] The settling administrator would effectively enshrine his or her views as to the exercise of discretionary authority. In this particular instance, the resulting constraint on agency discretion contravenes Congress' explicit intent that such discretion be available to cope with future is-

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[23] [Continued]

Defendants' Memorandum . . . In Support of Defendants' Cross-Motion To Modify The Decree, served August 3, 1981, at 30-31.

The district court's denial of EPA's 1981 motion is encompassed by the petition in this case. *See supra*, at 13-14.

[24] As this Court recently observed in a related context (the institutional concerns of the Solicitor General), "the panoply of important public issues raised in governmental litigation may quite properly lead successive Administrations of the Executive Branch to take differing positions with respect to the resolution of a particular issue." *United States* v. *Mendoza*, 52 U.S.L.W. 4019, 4021 (U.S. Jan. 10, 1984).

[25] Judge Wilkey observed that such an agreement could as easily fix in place a specified low level of regulation as go beyond an agency's statutory obligations with regard to regulation, because almost any provisions could pass the vague tests of "public interest" and "consistency" with the general purposes of the underlying statute. (718 F.2d 1135-36, App. A 41a-42a.)

sues which could not be anticipated by Congress at the time the enabling legislation was enacted. *See supra*, at 8-9, quoting Congressman Roberts, floor manager in the House during passage of the 1977 Amendments to the Act.

The question at issue here is by no means academic, or unique to this one case.[26] Rather, it has an important bearing on the continued interaction of the Executive, Legislative, and Judicial Branches.[27]

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[26] The court of appeals for the D.C. Circuit has, for example, recently faced the issue of the extent to which a judicial order based upon a stipulation or contract by an agency official could prevent his successor from changing course. *National Audubon Society, Inc.* v. *Watt*, 678 F.2d 299, 301, 305 n.12 (D.C. Cir. 1982). Contractual obligations, however, raise less severe problems than those embodied in a court decree because the power of the court is not implicated so directly. Indeed, if no dispute arises over implementation of a contractual obligation, the courts need not be involved regarding the contract.

[27] As Judge Wilkey warned in his dissent, a discretion-constraining decree diminishes both Executive and Congressional power, as well as public participation in administrative processes. (718 F.2d 1136-37, App. A 42a-44a.)

Such a decree would prevent any new policy initiative of the Executive Branch from taking effect without prior judicial approval. Conversely, and perhaps of equal importance, such a consent decree could provide the executive with a vehicle for avoiding responsibility for its administrative programs, thereby lessening agency accountability in the democratic process of government.

Besides negating discretion granted to an officer by Congress in a statute, such a decree also inhibits congressional influence on policy formulation and implementation by an agency. (718 F.2d 1136, App. A 43a (Wilkey, J., dissenting).) The informal give and take with Congress that characterizes the modern administrative process would be stifled because an agency could not respond to congressional concerns without prior approval of the court.

II. THE COURT OF APPEALS ERRED IN RULING THAT THE DECREE WAS NOT SUPERSEDED BY THE 1977 AMENDMENTS TO THE CLEAN WATER ACT AND THAT THE DECREE WAS ENFORCEABLE NOTWITHSTANDING MOOTNESS OF VIRTUALLY ALL OF THE UNDERLYING CAUSES OF ACTION

Two other questions decided by the court of appeals also merit review by this Court. In its preliminary decision of September 1980, the court of appeals concluded that the decree in this case was not superseded by the 1977 Amendments to the Clean Water Act, notwithstanding the explicit statements to the contrary by Congressman Roberts, the floor manager of the Conference Report in the House (*see supra*, at 8-9), as well as other indicia of legislative intent. *Environmental Defense Fund, Inc.* v. *Costle*, 636 F.2d 1229, 1233-44 (D.C. Cir. 1980), App. A 56a-71a. In addition, the court of appeals decided that the decree was fully enforceable and that the causes of action underlying the decree were not moot because a remnant of controversy remained regarding criteria adopted in 1973 to list pollutants as toxic and also because allegations in the complaints regarding pretreatment standards had been subsumed in the "comprehensive interrelated package" of provisions in the decree. (636 F.2d 1248, App. A 78a.) These rulings are erroneous and deserve review by this Court because of the considerable continuing effect of the decree on the Agency's regulatory actions under the Clean Water Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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